U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 13 September 2004

CASE NO.: 2003-LHC-2243

OWCP NO.: 02-112610

IN THE MATTER OF:

OLA F. STEPHENS

Claimant

v.

ARMY & AIR FORCE EXCHANGE SERVICE

Employer

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JOHN WALKER, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Ola F. Stephens (Claimant) against Army & Air Force Exchange Service (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 9,

2004, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 11 exhibits, Employer proffered 14 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer by the brief due date of May 10, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on March 25, 1997.

2. That Claimant's injury occurred during the course and scope of her employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on March 25, 1997.

5. That Employer filed Notices of Controversion on July 16, 1997, September 18, 1997 and December 8, 1997.

6. That an informal conference before the District Director was held on January 23, 2003.

7. That Claimant received temporary total disability compensation benefits from March 28, 1997 through November 10, 2000 at a weekly compensation rate of $214.08 for 139 weeks. Claimant also received permanent partial disability benefits from November 11, 2000 and continuing for a loss of wage earning capacity at the rate of $29.90 per week.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

8. That Claimant's average weekly wage at the time of injury was $321.12.

9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

10. That Claimant reached maximum medical improvement (MMI) on August 4, 2000.

II. ISSUES

The unresolved issues presented by the parties are:

1. Claimant's wage earning capacity.

2. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by telephone on July 17, 2003. (EX-12). Claimant also testified at trial. Claimant was 48 years of age at the time of the formal hearing and worked for Employer for about 22 years before her job injury. She was a reorder associate for Employer at Shepherd Air Force Base in Wichita Falls, Texas, whose duties were to stock, replenish inventory, receive and return merchandise. She suffered an injury on March 25, 1997, while lifting boxes of videos weighing approximately 50 pounds onto a palette. (Tr. 13-14; EX-12, p. 3). She testified that she had no back pain or spinal problems before March 25, 1997. (Tr. 14-15).

She felt immediate lower back pain which radiated down both her legs while lifting a box. (Tr. 15). She completed an accident report and went home thinking she had suffered a pulled muscle. She treated with a chiropractor for four months thereafter, but did not try to continue working. She also treated with her personal physician, Dr. Leslie Serano, who put her on bed rest. (Tr. 16; EX-12, p. 3). Dr. Serano later referred her to the Texas Back Institute in Plano, Texas. (Tr. 16-17; EX-12, p. 3). Dr. Jack Zigler was assigned as her treating orthopedist at the Back Institute. (Tr. 17).

Claimant testified that she underwent a back fusion by Dr. Zigler about two and one-half years after her job accident. (Tr. 17; EX-12, p. 3). Dr. Zigler recommended the surgery when she "first went to see him" and had a MRI done. (Tr. 17-18). She stated the delay in surgery was caused by Carrier's lack of approval or authorization for the procedure. (Tr. 19). She had pain relief after the fusion surgery, but the pain has worsened since the surgery. (Tr. 19-20). She reported to Dr. Zigler at each visit after the surgery that her back and leg pain was severe. Dr. Zigler explained that the surgery would take longer to heal because "it took so long to have the surgery approved." (Tr. 20-21).

Claimant also treats with Dr. Patel, a pain management specialist, who has prescribed pain medication. At the time of her deposition, Claimant was taking Lortab, Phenergan, and Zoloft on a daily basis, but was trying to have Dr. Patel change her medications. (EX-12, p. 7). She is currently using a Norgesic pain patch which is changed every three days and causes scarring and burning of the skin. (Tr. 21, 25). She testified that her activity varies while on the pain patch: on the first day she does grocery shopping; on the second day she is in bed and by the third day she is in bed all day. (Tr. 21-22). She is also taking an anti-depressant medication. Claimant testified at her deposition that she saw Dr. Zigler in January 2003 because Mr. Morgan, Carrier's adjuster, needed a statement of her disability from the primary care doctor; at that time, Dr. Patel had already put Claimant on total disability. (EX-12, p. 5).

Her daily activities include watching television and trying to sleep. (Tr. 22; EX-12, p. 5). She applied for and was awarded Social Security Disability benefits in May 2003. (Tr. 22). A spinal stimulator has been recommended for her pain, but she has not decided to pursue the stimulator because people who have had the procedure relate that they are back on heavy medication six months after the implantation. (Tr. 23).

On cross-examination, Claimant acknowledged that she has not re-applied for employment with Employer since her accident/injury. (Tr. 26). However, during her deposition, Claimant testified that she attempted to perform her old job pursuant to the restrictions imposed by Dr. Zigler. She was told not to engage in the restricted activities, but Claimant stated the restrictions made it impossible to do her old job. (EX-12, p. 5). She has sought a medical retirement which Employer has never offered. She responded to Mr. Kirksey's

first labor market survey by going to "two places" of employment on the list, but was referred to the Texas Workforce Commission (TWC). (Tr. 26). The Commission informed her that all eight of the jobs on the survey had been filled. She was attending physical therapy when the first survey was provided and stated she would not have been able to do the jobs because of her pain and therapy. She did not return to the TWC to seek other similar employment opportunities. (Tr. 27; EX-12, pp. 5-6). Although Dr. Zigler released her to return to work with restrictions, she never applied for any jobs because she was still in physical therapy. (Tr. 28; EX-12, p. 5). Claimant has not felt that she could return to light duty jobs at anytime since her surgery. (EX-12, p. 5).

After her back fusion surgery, Claimant underwent physical therapy at Texas Rehab three times each week. Claimant was not sure how long the physical therapy continued, but believes it lasted for about three months. (EX-12, p. 8). She also stated that she underwent physical therapy one year prior to her deposition. She approximated that the more recent physical therapy sessions were three times a week for two to three months. (EX-12, p. 8).

Claimant stated she maintained her status with TWC for about six months after, but had her classification changed from secretarial jobs recommended by Mr. Kirksey. (Tr. 29-30). She receives $940.00 per month in Social Security disability benefits and $135.00 in Section 8 housing assistance. (Tr. 30-31). She acknowledged that she was found disabled by the Social Security Administration based on a diagnosis of "Anemia." She denied that anemia was the primary reason for the award of disability benefits, but was told it was because of a combination of her back condition and anemia. (Tr. 31-32). She has always had anemia, but never sought medical treatment for the condition and did not find out about the condition until preparation for her back surgery. (Tr. 32).

Claimant completed two years of college majoring in computer and business. She has taken computer-based training in sales and merchandising. (Tr. 33-34; EX-12, p. 10). She also worked as a machine operator and production worker for Ingersoll Rand performing duties as a lead person training and supervising a group of individuals assigned to the sorting area. (Tr. 33-34). She studied computer programming at Vernon Regional Junior College, but did not receive a degree or certificate. She stated that she could have typed 30 words a minute at some unidentified time. (Tr. 35).

Claimant confirmed that she was examined by Dr. Callewert on behalf of Employer who opined initially that she did not need surgery but later concluded she needed a microdiskectomy rather than a fusion. (Tr. 38). Dr. Zigler disagreed with the microdiskectomy because it would not resolve her leg pain. (Tr. 38-39). She affirmed she was disappointed in the treatment received from Employer when she had given her best to Employer. (Tr. 39). She acknowledged she filed two complaints of discrimination against Employer with EEOC, one of which was found meritorious. (Tr. 41).

As a remedy for her claim, Claimant stated she hoped to gain a medical retirement from Employer, a return of her fully vested base privileges, continuing medical benefits (of which a $313.00 emergency room bill is outstanding) and payment of total disability benefits rather than the partial benefits Employer has paid for the last approximate three years. (Tr. 44-45). She has been paid mileage for her trips from Wichita Falls, Texas to the Back Institute in Plano, Texas of about 300 miles round trip. (Tr. 47).

Claimant explained that her physical duties as a reorder associate required lifting "whatever they ask you to do at the time," climbing ladders, constant bending and stooping. (Tr. 49-52).

In rebuttal, Claimant stated she informed Mr. Kirksey that she could only sit comfortably for about one hour, but then pain started bothering her after about 10 minutes and there was no way she could do a job sitting all day. She claimed that after being at the formal hearing she needed "to be flat on my back on a heating pad." (Tr. 93-94). In her deposition, she stated she needs to change positions after sitting for thirty minutes, walks with a limp, and uses a cane. (EX-12, p. 6). She stated that if she were in a position where she had to sit up for two to three hours, she would not be able to do that repetitively during the course of a week. She does not socialize much because of her depression and pain which she thought would prevent her from working again. (Tr. 94-95). She stated if she worked for two to three hours in one day, she would be flat on her back for two to three days. (Tr. 95). She testified she has not been able to work 40 hours per week since her accident/injury in 1997. (Tr. 96; EX-12, p. 8).

Kenneth Kirksey

Mr. Kirksey is a certified vocational rehabilitation counselor with 30 years of experience who is also certified by the U.S. Department of Labor (DOL) as a rehabilitation counselor for longshore claims. (Tr. 56).

Mr. Kirksey met with Claimant on two occasions, at an initial interview on August 30, 2000 and for an update of her condition on December 10, 2003. (Tr. 58). He reviewed her educational and vocational history concluding that Claimant "has a lot of clerical skills and supervisory experience and organizational skills." (Tr. 58-60).

He conducted a labor market survey in the Wichita Falls, Texas area based on restrictions assigned by Dr. Zigler and a functional capacity evaluation (FCE) performed on May 25, 2000. Dr. Zigler's restrictions of April 2000 were lifting no more than five to 10 pounds, occasional to frequent sitting, occasional standing or standing no more than 18 minutes continuously, occasional walking or walking no more than 15 minutes continuously, occasional stooping, occasional bending, occasional twisting, and occasional pushing or pulling of 50 pounds. Dr. Zigler also stated Claimant should rarely climb any stairs, rarely kneel with no squatting, crouching or climbing ladders. (Tr. 61).

Mr. Kirksey prepared a report for the period from September 13, 2000 to October 18, 2000, which includes a labor market survey identifying eight jobs in the Wichita Falls, Texas area. (Tr. 62; EX-11, pp. 4-8). The following full-time jobs were identified, all of which comported with the restrictions assigned by Dr. Zigler noted above:

1) a cashier-clerk position with Wichita County Family Court Services requiring "taking probation payments and cash in person and by mail, inputting data into a case management information system, occasional filing and typing of letters," with a capability to type 30 to 40 words per minute. (Tr. 62-63). The job paid $7.99 per hour for 40 hours of work or $1,385 per month. (Tr. 63).

2) a secretary position at Midwestern State University with a need to know Word and Excel. No typing speed was specified, although 30 words per minute would be sufficient. Duties included answering correspondence,

distributing mail, keeping and preparing records. The job paid $7.62 per hour or $1,320 per month. (Tr. 63-64).

3) a purchasing assistant for Midwest Dental Equipment and Supply Company to take phone and e-mail orders and operate a computer terminal. (Tr. 64). The job paid $8.00 per hour. (Tr. 65).

4) an imaging clerk job with the Wichita County Sheriff's Department comparing legal documents, data entry and other clerical duties. On rare occasions she may need to go to the Sheriff's office and climb a flight of stairs of five to six steps. The job paid $7.68 per hour or $1,332 per month. (Tr. 65).

5) a clerk position with the Helen Faraby Center as a monitor and compliance specialist performing data entry, completing client registration forms, distributing reports and documents. The job paid $7.28 per hour for 40 hours per week. (Tr. 66).

6) a collections clerk at Rose Street Mental Health Care filing insurance claims and performing collections on accounts. The job paid $8.50 per hour for 40 hours per week. (Tr. 66-67).

7) a secretary position with Helen Faraby Center which paid $7.28 per hour for 40 hours per week. (Tr. 67-68).

8) an alarm monitor for IHR Security monitoring an electronic alarm detection system at a console and contacting police or fire departments when a disturbance or emergency occurs. The potential employer would not disclose the salary, but indicated it was above the minimum wage level. (Tr. 68).

Mr. Kirksey testified that he provided Claimant with the above job leads. Claimant's job application with Employer indicates she could type 30 words per minute. (Tr. 69). Mr. Kirksey submitted the foregoing jobs to Dr. Zigler for approval and on November 10, 2000, Dr. Zigler approved all eight jobs for Claimant. (Tr. 71; CX-1, p. 58). Dr. Kern, who assigned less restrictive activity for Claimant, also approved the eight jobs contingent upon the approval by Dr. Zigler[2]. Dr. George Wharton

[2] Claimant's deposition testimony indicates that Dr. Kern did not examine Claimant on September 20, 2002; instead Claimant

also approved the eight jobs from a physical standpoint on January 7, 2004. (Tr. 72).

In January 2004, Mr. Kirksey performed an updated labor market survey based on the same restrictions used for the first survey. He located six full-time jobs in the Wichita Falls, Texas area which he opined were within Dr. Zigler's assigned restrictions of April 2000. These six jobs were not presented to Claimant nor was a report thereon offered into the instant record. (Tr. 85). The following updated jobs also comport with Dr. Zigler's restrictions for Claimant:

1) a dispatcher job with the Wichita Falls Police Department which is "mostly sedentary" with a mean hourly rate of pay of $9.21 per hour. (Tr. 73-74).

2) a call center representative for Cingular Wireless handling customers who call in with questions, complaints or inquiries. The job pays $9.00 per hour. (Tr. 74).

3) a full-time unit representative with United Regional Health Care Systems of Wichita Falls performing clerical and receptionist duties. The position pays a mean hourly rate of $9.00 per hour. (Tr. 75).

4) an insurance verification clerk position also with United Regional Health Care Systems which paid a mean hourly rate of $11.02 per hour. (Tr. 75-76).

5) a manager trainee position with Enterprise Rent-A-Car renting cars and completing associated paper work which paid $10.08 per hour. (Tr. 76-77).

6) a reservations sales representative with Cendant Car Rental Group making car reservations paying $10.08 per hour. (Tr. 77-78).

Mr. Kirksay testified that similar jobs to those set forth in both labor market surveys are open in the Wichita Falls, Texas area on a regular basis. (Tr. 79). He opined that Claimant could secure a job and be gainfully employed if she diligently tried. (Tr. 80).

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testified that Dr. Kern informed her that he was "going strictly by the letter that Mr. Morgan sent him." (EX-12, p. 8).

Mr. Kirksey also identified two part-time positions on February 5 and 6, 2004 through the TWC that paid $5.75 per hour. The first job as a night watch guard required work for 18 hours per week checking IDs inside a building and providing directions to people entering the building. It was an unarmed position involving "sitting almost all the time at a counter in the lobby of the building." The job requirements comport with the restrictions placed on Claimant by Dr. Zigler. (Tr. 81). The second job was as a mental health aide at an assisted living center sitting with residents. The job was within the restrictions assigned by Dr. Zigler. (Tr. 82).

Mr. Kirksey testified that at the follow-up interview conducted on December 10, 2003, Claimant reported she could lift "about a gallon of milk" which is eight to 10 pounds; sit continuously for two hours; had no problems climbing stairs; could drive okay, but had problems getting her left leg in and out of the car; could stand continuously for a couple of hours with breaks; walk one and one-half to two hours; bend if she has to; could kneel and squat, but has problems arising. (Tr. 85).

On cross-examination, Mr. Kirksey acknowledged potential employers are looking for employees who are dependable and that an employer would not tolerate Claimant if she is "bedfast." He affirmed that he is not contending Claimant could return to her former job. (Tr. 87). He stated he had not determined whether she could return to her former job since he did not know enough about the physical requirements of her former job. He stated Claimant "probably could not" return to her former job as described at the hearing based on the restrictions assigned in 2000. (Tr. 88). Mr. Kirksey did not think a spinal fusion or depressive medications would affect Claimant's ability to get or keep employment. (Tr. 90-92).

The Medical Evidence

Medical Evidence

Dr. Glenn Cavett

On March 28, 1997, Claimant was first treated by Dr. Cavett, a chiropractor, and complained of pain in both hips that extended into her lower back and left leg which she attributed to lifting a number of heavy boxes at work. (CX-1, pp. 147-149) Dr. Cavett's initial diagnosis was Lumbar Subluxation Complex and Lumbar Intervertebral Disc Syndrome which he believed was a work-related trauma. (CX-1, pp. 144-145). On May 1, 1997,

Claimant underwent a lumbar MRI at the request of Dr. Cavett which indicated "a very small right paracentral disc bulge at L5-S1 that posteriorly displaces the right S1 nerve root very minimally." (CX-1, p. 141). Dr. Cavett continually authorized Claimant's absence from work beginning on March 28, 1997, and extending through July 31, 1997. (CX-1, pp. 134, 142, 144).

Dr. John D. Reeves

Claimant was referred to Dr. Reeves by Dr. Cavett and was examined on June 4, 1997.[3] (CX-1, p. 138). Claimant complained of constant lower back pain with frequent spasms, as well as shooting pain across her back into her buttocks and left leg. Dr. Reeves noted Claimant movements were slow and she poorly performed flexion/extension maneuvers. Id. Dr. Reeves reviewed Claimant's MRI and opined that Claimant has minor degenerative change at the L5-S1 level with a small protrusion of the disc at L5-S1, which might be an annular tear. (CX-1, p. 139). He recommended conservative management and continued care by Dr. Cavett. He also recommended that Claimant begin a routine of stretching exercises and back stabilization exercises, but did not find indications for surgical intervention. Id.

Dr. Reeves performed a follow-up on July 9 and 30, 1997, at which time he noted Claimant experienced continued lower back and leg pain. (CX-1, pp. 132-133). He diagnosed the condition as "annular tear syndrome" and agreed with Dr. Ronald Woosley's assessment of a six-month improvement time. Id. Dr. Reeves advised Claimant to try to return to work with a 10-pound lifting restriction and suggested that she implement back support for any lifting activities. Id. On August 8, 1997, Dr. Reeves released Claimant to return to work, for light duty only, subject to the 10-pound lifting restriction, no repetitive lifting or loading, and her continued physical therapy requirements. (CX-1, p. 130).

Dr. Ronald E. Woosley

At the request of Employer, on July 2, 1997, Claimant was first examined by Dr. Woosley who found Claimant had full range of motion in her back with discomfort.[4] (CX-1, p. 136). Dr. Woosley did not offer a conclusive diagnosis, but noted Claimant

[3] The record does not contain any information relating to the credentials of Dr. Reeves.

[4] The record does not contain any information relating to the credentials of Dr. Woosley.

may have an annular tear which would require up to six months to heal. Id. His suggested treatment included "an epidural steroid injection and continued analgesics." (CX-1, p. 137). Dr. Woosley further indicated that the Claimant could return to work for two weeks on half days, and then return to full duty if tolerable. (CX-1, p. 137).

Dr. Woosley examined Claimant again on February 13, 1998, when she complained of continued pain in her lower back and into her left leg, as well as numbness in both legs. (CX-1, p. 110). Claimant required assistance in getting on and off the examining table. Her pain was aggravated by movement of her lower extremities. He diagnosed Claimant's condition as chronic post-traumatic back pain, by history, related to her work injury, as that was the only injury in the Claimant's history. Id. Dr. Woosley recommended continued conservative treatment as opposed to discectomy and fusion recommended by Dr. Zigler; he opined Claimant would have been unable to work since August 5, 1997, "due to her persistent pain" and incapable of returning to regular duty; and, he did not believe the Claimant had reached maximum medical improvement. (CX-1, p. 111).

Dr. Jack E. Zigler

Dr. Zigler, a board-certified orthopedist, was deposed by the parties on February 2, 2004. His first examination of the Claimant was on August 25, 1997, when Claimant complained of back pain since lifting a 30-60 pound box at her place of employment on March 25, 1997. Dr. Zigler examined Claimant, took X-rays, and reviewed the MRI of May 1, 1997. He noted a slight asymmetry at the L5-S1 disc that caused displacement of the S1 nerve root. (CX-1, p. 126). Dr. Zigler recommended discography of L5-S1, L4-5, L3-4 levels, followed by a CT scan "through the discs." Id. Dr. Blaise W. Jones reported the findings of the discography on September 12, 1997, which indicated reproduction of severe low back pain and alleviation of Claimant's pain within five minutes of a Xylocaine injection into the L5-S1 disc. (CX-1, p. 122).

Claimant began follow-up visits with Dr. Zigler on September 19, 1997, and was continued off work with a recommendation for surgery as a result of the positive discogram. (CX-1, p. 118). On December 19, 1997, Dr. Zigler noted the Claimant experienced significant back pain, as well as decreased effectiveness of her medication, and remained a candidate for an L5-S1 anterior lumbar interbody fusion, but without authorization from Employer. (CX-1, p. 114). Claimant

continued follow-up examinations with Dr. Zigler throughout 1998 and 1999.[5] Records from Dr. Zigler indicate that Claimant was constantly in pain during this period **and did not return to work**. On May 19, 1998, Dr. Zigler reported that Claimant experienced increased pain in her left leg with a clinically "significantly worsened" condition, which included pain into her ankle. A repeat MRI was recommended. (CX-1, p. 102).

A second MRI, performed by Dr. Fisk on July 6, 1998, showed an abnormality in the L5-S1 disc that resulted in a posterolateral disc protrusion with a mild effect on the S1 nerve root. (CX-1, pp. 100-101). Dr. Zigler followed the MRI with an examination of Claimant on July 13, 1998, during which she complained of continued significant back and leg pain. At this time, Claimant was unable to work and was using narcotic analgesic medications. Claimant was not benefiting from "conservative therapy" and exhibited "symptomatic L5-S1 disc herniation" with a need for appropriate interventional treatment. Id.

On April 12, 1999, Dr. Zigler again reported a worsened condition which included constant pain in the lower back that radiated into Claimant's upper back and shoulders, as well as down into both legs. (CX-1, p. 90). He indicated Claimant experienced "significant paralumbar muscle spasm," tenderness, and limited motion. He opined that Carrier's "unbelievable delay" in authorizing surgery "will undoubtedly resolve in a poorer clinical result and a longer rehabilitation time." Id. Dr. Zigler again examined Claimant on July 19, 1999, finding her condition to be "unchanged." (CX-1, p. 87). Claimant experienced discomfort while sitting and felt pain in both legs if she sat for more than one hour. Claimant continued to be a candidate for lumbar discectomy and fusion. Id.

From September 1997 until August 1998, during the course of his treatment of Claimant, Dr. Zigler pursued a request for an L5-S1 anterior lumbar interbody fusion. He disagreed with Dr. Woosley's assessment that Claimant could be treated through "conservative care." (CX-1, pp. 104-105). According to Dr. Zigler, a continued delay in the surgical procedure would cause poorer and slower results in the Claimant's recovery. (CX-1, p. 105; CX-10, p. 9).

[5] Claimant saw Dr. Zigler in January, May, and July of 1998. Visits to Dr. Zigler continued in January, April, and July of 1999 before Claimant underwent surgery.

At the request of Employer, Claimant was examined by Dr. Callewart on August 24, 1998. Dr. Callewart diagnosed Claimant's condition as a ruptured L5 disc after reviewing the MRI taken on May 1, 1997, the X-rays dated August 25, 1997, and the MRI taken on July 6, 1998. (CX-1, pp. 97-98). Dr. Callewart recommended Claimant undergo a lumbar microdiscectomy at L5; but, in Dr. Callewart's opinion, Claimant's condition did not require a fusion which would "increase her impairment unnecessarily." (CX-1, pp. 97-98). On October 4, 1998, Dr. Zigler disagreed with Dr. Callewart's assessment, and maintained that Claimant suffered from discogenic pain syndrome which would be best remedied with an anterior lumbar interbody fusion. (CX-1, p. 94).

On August 17, 1999, Claimant was cleared for surgery in a Behavioral Medicine Evaluation by Dr. Andrew R. Block. (CX-1, pp. 82-86). On August 26, 1999, Dr. Zigler performed an "anterior lumbar interbody fusion at L5-S1." (CX-1, pp. 79-81; CX-10, p. 6). The procedure used BAK fusion cages "which were metal screw-in thimbles...using the patient's own bone inside those cages." (CX-10, p. 9).

Dr. Zigler continued follow-up treatment of Claimant after her surgery. His progress notes indicated an improvement in her condition, namely significant relief from the prior back pain[6]. (CX-1, pp. 74-77). During her initial post-surgery examination on September 10, 1999, Claimant complained of some pain in her left leg which Dr. Zigler attributed to "radicular sciatica." (CX-1, p. 77). On October 18, 1999, Claimant informed Dr. Zigler of episodic sharp pain in her knee; Claimant was not ready for physical therapy, but was placed on a continuing home "ambulation program." (CX-1, p. 76).

Dr. Zigler examined Claimant on December 10, 1999, at which time she demonstrated some lumbar stiffness, but no longer experienced the "pre-operative buttock and leg component of the pain." (CX-1, p. 75). Claimant was placed on a physical therapy program and continued taking anti-inflammatory and analgesic medication, and Vicodin as needed. Id.

On February 4, 2000, Dr. Zigler interpreted radiographs as showing excellent position of the BAK cages placed during surgery and released Claimant to care on an "as-needed basis."

[6] In his deposition testimony, Dr. Zigler stated Claimant experienced significant initial improvement that "plateaued and then slowly deteriorated over time." (CX-10, p. 10).

(CX-1, p. 74). Claimant was to be scheduled for physical therapy and a Functional Capacity Evaluation. Id. An April 10, 2000, Work Status form signed by Dr. Zigler released Claimant to full-time work with a 5-10 pound lifting/carrying restriction and allowing for frequent sitting position changes required [7] (CX-1, p. 73). During re-evaluation on May 1, 2000, Claimant informed Dr. Zigler that she was not able to attend physical therapy or her Functional Capacity Evaluation as scheduled at the February visit. (CX-1, p. 72).

On May 25, 2000, Claimant underwent a Functional Capacity Evaluation (FCE) at the Texas Back Institute. (CX-1, pp. 67-71). Claimant had not undergone physical therapy and she was taking Vicodin for pain and Phenergan for nausea. (CX-1, p. 68). She complained of intermittent pain aggravated by the following factors: weather, increased activity, sitting or standing too long, and getting up and down. Id. The FCE lift screening suggested Claimant could occasionally lift between 5 and 15 pounds, depending on the lifting position. However, Claimant was "unable" to engage in frequent lifting of any kind. (CX-1, p. 70). Regarding non-material handling, the FCE reported Claimant was capable of occasionally engaging in the following activities: standing, walking, stooping, trunk bending, eye level reach, pivot twist, and push-pull. (CX-1, p. 71). The FCE also indicated Claimant could frequently engage in a forward reach, and sitting could be done at a level rated "occasional to frequent." Id. The FCE stated that Claimant should rarely engage in stair climbing or an overhead reach, and Claimant could withstand kneeling rarely to never. Finally, the FCE reported that Claimant should never partake in squatting, crouching, or ladder climbing. Id. Summarized, the results of the FCE stated that Claimant functioned at a "less than sedentary physical demand level;" it recommended physical therapy 3 times a week for 2 weeks, followed by a 4-6 week work hardening program. (CX-1, p. 67).

Based on the results of the FCE, Dr. Zigler released Claimant for full-time work on August 4, 2000. (CX-1, p. 66). In addition to the "non-material handling" and lifting restrictions found in the FCE, Dr. Zigler limited Claimant's pushing/pulling capabilities to a 50-pound wheeled cart. Id. Also, Claimant was restricted to carrying a maximum of 10 pounds

[7] Dr. Zigler had previously signed Work Status forms indicating that Claimant was unable to return to work, beginning on August 25, 1997, and continuing "until further notice pending surgery." (CX-1).

and waist/pivots were set at a 15-pound maximum. Id. Dr. Zigler also examined Claimant who stated she still experienced daily back aches, but not as intensely as prior to surgery. (CX-1, p. 65). He found Claimant to have a "good range of motion, but still restricted functionally." Id. Dr. Zigler stated that Claimant had reached maximum medical improvement as of August 4, 2000. Id.

Claimant had sessions of physical therapy throughout October 2000. She reported periods of back spasms and continued pain. (CX-1, pp. 62-63). During her sessions on October 10th and 17th, therapy consisted of 15 minutes of moist heat to her back and followed by therex and functional activities with concentration on lumbar stabilization. Claimant's therapy also included "quadruped position raising of alternate arm and leg to progress in activity" which caused some pain. (CX-1, p. 63). The therapy sessions on October 18th and 24th also began with moist heat therapy followed by therex and functional activities. (CX-1, p. 62). Claimant progressed by increasing total chair press-ups to three sets of twelve. Otherwise, the physical therapy report indicated that the Claimant's progression had plateaued. Id.

Dr. Zigler re-evaluated Claimant on February 2, 2001, when she reported suffering from back pain if seated for 1-2 hours. (CX-1, p. 57). She also informed Dr. Zigler that her left little toe had remained numb since surgery. Id. On June 14, 2001, Dr. Zigler referred Claimant to Dr. Patel for further monitoring of her progress and pain management. (CX-1, pp. 44, 55-56; EX-8, p. 34).

On November 16, 2001, Dr. Zigler re-examined Claimant, two and one-half years after her back fusion. She reported continued and worsening left leg pain and numbness. (CX-1, p. 40). Claimant did not state that she experienced back pain. Dr. Zigler found "solid radiographic fusion at L5-S1 with nice sentinel fusion anteriorly," and recommended continued care by Dr. Patel. Id.

Dr. Zigler examined Claimant on January 31, 2003, during the course of Claimant's treatment by Dr. Patel. Dr. Zigler agreed with Dr. Patel's assessment that Claimant should be excused from work due to her required heavy medication and the failed success of conservative management. Dr. Patel also recommended consideration of a dorsal column stimulator. (CX-1, p. 16). Claimant's MRI scan indicated "facet arthrosis at L4-L5 about the level of fusion." Id. The electrodiagnostic testing

revealed "mild chronic ongoing L5-S1 radiculopathy." Id. Radiculopathy is an abnormality in a nerve root that may cause pain during periods of activity. (CX-10, p. 12). In his deposition, Dr. Zigler opined the condition stems from "settling of the disc causing irritation of the nerve before the fusion was performed." (CX-10, p. 23). A spinal cord stimulator reduces such pain in some patients, but the device would not remedy the condition. (CX-10, pp. 13, 22). For patients experiencing L5-S1 radiculopathy, Dr. Zigler recommends physical therapy, medication, and a spinal cord stimulator if the condition continues. In addition, he recommends that overweight patients lose weight and begin a regular exercise routine.[8]

In his deposition and in a letter dated November 5, 2003, Dr. Zigler agreed with Dr. Patel's finding of total disability. (CX-1, p. 16; CX-1, p. 2; CX-10, p. 11). According to Dr. Zigler, Claimant's condition had deterioriated since her original FCE and he recommended obtaining a new FCE to determine Claimant's work capabilities. (CX-10, p. 21). Dr. Zigler further indicated that Claimant should continue under the care of Dr. Patel for pain management. (CX-10, p. 23).

Dr. Nayan R. Patel

Dr. Patel first examined Claimant on June 15, 2001, through a referral from Dr. Zigler.[9] At that time, Claimant complained of back pain when seated for 1-2 hours, as well as left-sided spasms and left lateral leg pain. (CX-1, p. 52). Dr. Patel examined Claimant on a follow-up visit on June 15, 2001, at which time he noted continued complaints of "left-sided low back, lateral hip and leg pain." Id. Claimant discussed lower back muscle spasms which Dr. Patel attributed to lumbar spine muscular deconditioning and fatigue and over strain of the area. Id. Dr. Patel noted that Claimant walked with an antalgic gait and favored her right side. Id. He found that she experienced left trochanteric bursa tenderness. Dr. Patel recommended Claimant start a physical therapy program, focusing on the trochanteric bursa area and working on ultrasound, stretching, range of motion of the left hip abductors and hip flexors, and

[8] Dr. Zigler suggested one to two hours of physical therapy, three times a week. For a home program, he suggested three to four one-hour sessions each week, if a patient were on a home program. (CX-10, p. 24).

[9] The record does not reflect any information relating to the credentials of Dr. Patel.

if no improvement results undergoing a cortisone injection of the left hip bursa area. (CX-1, p. 53).

On August 24, 2001, Dr. Patel again examined Claimant. After three weeks of therapy, she continued to experience regular pain in the left side in the lateral hip and going into her leg and foot. (CX-1, p. 49). Dr. Patel instructed Claimant to continue receiving physical therapy.[10] He indicated that Claimant was not ready to go back to work as reflected on a Work Status form. (CX-1, pp. 48-49). On August 27, 2001, Claimant was admitted to the emergency room at United Regional Health Care System because she suffered from severe back pain. Dr. Ram Selvaraj, the attending physician, diagnosed the condition as chronic back pain. (CX-1, pp. 46-47).

On November 16, 2001, Dr. Patel indicated that Claimant had been getting early refills of her medication and informed her that she would be discharged from the clinic if she continued to do so. (CX-1, p. 41). She informed Dr. Patel that she must take Vicodin more frequently and Dr. Patel instructed her not to increase her medication. Id. Dr. Patel refilled Claimant's medication and prescribed Neurontin, a neuropathic medication. Id.

On February 22, 2002, Claimant returned for follow-up evaluation continuing to report left leg pain. Dr. Patel recommended an EMG study of the left lower extremity. (CX-1, pp. 32-33).

An EMG was ordered on May 16, 2002, which identified "radicular irritation at left S1 distribution." (CX-1, pp. 30-31). Dr. Patel also ordered an MRI scan and referred Claimant to Dr. Ralph Rashbaum to determine if she was suited for surgical options versus a spinal cord stimulator. Id. Blood work from the prior examination returned a severely low hematocrit and hemoglobin count. Claimant received blood transfusions during an emergency room visit and lab work showed significant microcytic anemia. Id.

On June 19, 2002, Claimant underwent an MRI interpreted by Dr. John D. Beerbower. The MRI indicated that the status of the L5-S1 fusion was indeterminate. It further indicated "there may be minor posterior spondylosis into ventral epidural fat at this level but there is neural mass effect canal or significant

[10] Dr. Patel also ordered a continuance of physical therapy on September 14, 2001. (CX-1, p. 43).

foraminal stenosis." (CX-1, p. 28). Claimant returned to Dr. Patel on August 16, 2002. At that time, Dr. Patel's referral to Dr. Rashbaum for evaluation of any other surgical intervention versus a spinal cord stimulator was denied. (CX-1, p. 26). She was continued on her medication which consisted of Neurontin, Phenergan, and Vicodin. Id.

Dr. Rashbaum examined Claimant on October 28, 2002. He noted that she walked with an antalgic limp, but did not appear to be in acute distress. (CX-1, p. 19). Claimant easily got on her toes, but needed assistance with "heel walking." Dr. Rashbaum noted tenderness in the mid-portion of Claimant's lumbar spine. Id. He concluded that Claimant had "a left lumbar radicular syndrome greater than low back pain," making her a candidate for dual lead spinal cord stimulation trial. Id. Dr. Patel followed up on Dr. Rashbaum's recommendations on November 5, 2002, for placement of a spinal cord stimulator. At that time, Claimant stated that she was primarily bothered by leg pain that increased with activity. She was taking Neurontin, Fenaprin, and Vicodin to alleviate the pain and Dr. Patel expressed concern at her level of Vicodin usage. (CE-1, p. 17).

On January 1, 2003, Claimant had follow up appointments with both Dr. Patel and Dr. Zigler. Dr. Patel stated that she continued to limp on her left leg and reported pain in her left leg. (EX-8, p. 8). Claimant did not agree to a spinal cord stimulator, although Dr. Patel suggested a "trial." Dr. Patel prescribed a low dose of Zoloft.[11] He also prescribed Hydrocodon, Neurontin, and Phenergan.

On February 25, 2003, Dr. Richard Kownacki, a clinical psychologist, opined that Claimant was experiencing "severe depression with suicidal thoughts due to complications of a back injury" and he recommended medication and counseling. (CX-1, p. 14).

Dr. Patel examined Claimant again on May 21, 2003. Although Claimant was a candidate for a spinal cord stimulator, she did not want to pursue any further surgery. (CX-1, p. 12). Dr. Patel recommended a single epidural steroid injection pain

[11] Dr. Patel and Dr. Zigler indicated that depression is often seen with patients suffering from chronic pain. (CX-10, p. 11; EX-8, p. 6).

management.[12] Id. Dr. Patel opined that Claimant was permanently and totally disabled, supported by the fact that she had been approved for disability income benefits by the Social Security Administration and the opinions of independent physicians. Id. He felt that Claimant was depressed, but Contract Claims Services denied her prescription for Zoloft.[13] Id.

Claimant continued treatment with Dr. Patel and was last examined by him on December 9, 2003. At that time, Claimant was still considering the option of a spinal cord stimulator, but decided to be put on a trial of triplicate medications through the use of a Duragesic. (CX-1, p. 1). Dr. Patel continued to classify Claimant as totally and currently disabled. Id.

Dr. Jack A. Kern

At the request of Employer, Dr. Kern performed a medical examination of Claimant on December 20, 2001. Dr. Kern is board certified in orthopaedic surgery. (EX-9, p. 9). Claimant reported continuing low back pain and pain in both lower extremities with a numbness of the left foot. (CX-1, p. 35). His physical examination indicated Claimant to be a strongly muscled woman. Dr. Kern noted that spine mobility in the erect position was limited to no more than 20 degrees of flexion, inconsistent with her ability to get to and from the chair and examination table. (EX-9, p. 7). While seated, Claimant's knee and ankle reflexes were 2+ on both the right and left; she was capable of full knee extension without tilting her trunk. Id. Dr. Kern diagnosed her condition as work-related low back pain; although he did not find nerve root irritation, he did not doubt her continuing back and leg pain. Id. He opined that Claimant would not respond to further surgery since she had extended physical therapy, physical conditioning, and work hardening following surgery, and he did not agree with Dr. Patel's suggested injections. However, Dr. Kern did concur in continuing the prescription for Neurontin, anti-inflammatories, and non-addicting pain medication. Id. Dr. Kern also agreed with Dr. Zigler's opinion that Claimant could return to work subject to limitations and restrictions on her activities of 10

[12] A caudal epidural injection was performed by Dr. W. Scott Schaffer on June 6, 2003. (CX-1, p. 11).

[13] Due to her use of medications, Claimant's physicians required blood testing for side effects on kidney and renal function and blood count. The Workman's Compensation Carrier denied payment for such laboratory work. (CX-10, p. 13; EX-8, p. 4).

to 15 pounds lifting, no repetitive bending or squatting, and no repetitive overhead pushing/pulling or lifting. (CX-1, p. 38; EX-9, p. 8).

On September 20, 2002, Dr. Kern generated a second report based solely on available additional documentation. In his second report, Dr. Kern stated his opinion that Claimant may be able to reduce her pain through weight reduction and physical conditioning. (EX-9, p. 2). He noted a spinal cord stimulator as a possible pain management device. Id. Dr. Kern was unable to explain the cause of Claimant's continued pain, but suggested a delay in further surgery until such cause is identified. Id.

Dr. George W. Wharton

Dr. Wharton, who is board-certified in orthopaedic surgery and spinal surgery, was deposed by the parties on January 7, 2004. (EX-10; EX-12). Dr. Wharton performed a medical examination of Claimant on August 21, 2003, at Employer's request. Dr. Wharton found Claimant's spinal fusion to be healed and stable; poorly healed fusions could be chronically painful. (EX-13, p. 8). In addition, he indicated the importance of physical therapy following a lumbar fusion as a way to regain muscle tone, increase strength, and ultimately reduce stress on the back area. (EX-13, p. 10). In Dr. Wharton's opinion, each of the eight jobs identified by Mr. Ken Kirksey was suitable employment for Claimant. (EX-13, p. 13-19). According to Dr. Wharton, Claimant was generally employable and she was not totally and permanently disabled as a result of the spinal fusion; rather, Claimant was suited for clerical positions which require minimal lifting and the opportunity to frequently change positions. (EX-13, p. 20). In his experience, the re-employment level is 97% to 98% in motivated patients following an L5-S1 fusion. (EX-13, pp. 20-21).

Dr. Wharton stated that spinal fusion patients should engage in an exercise program, even as basic as walking 45 minutes each day. He indicated that "excessive weight and obesity" can aggravate the condition by placing additional stress on the lower back. He noted a reduced pain level in patients who successfully lose weight, as well as those who return to work. (EX-13, pp. 21-23).

The results of Dr. Wharton's physical examination of Claimant observed her muscle strength to be a four out of five in the lower legs, and a five out of five in her upper legs.

The straight leg raising tests generated negative results, indicating the Claimant did not have nerve root irritation. Dr. Wharton found Claimant's legs to be symmetrical which indicated that Claimant did not have a nerve deficit to the muscles in her thigh or calf. (EX-10, pp. 3-4; EX-13, pp. 24-26). Claimant had reached maximum medical improvement. (EX-10, p. 6; EX-13, p. 26).

Functional Capacity Evaluation (FCE)

On March 1, 2004, Claimant underwent a second FCE at the Texas Back Institute. Claimant was using a Duragesic patch and taking Neurontin, Phenergan, and Zoloft, as well as three over-the-counter pain killers. (EX-15, p. 6). She complained of bilateral lower back pain greater on the left side than the right side. She also complained of posterior leg pain through her "whole thighs, both feet and knees." Id. According to Claimant, her pain was aggravated by stooping or bending, walking around her house, driving or prolonged car rides, and prolonged sitting and standing. Id.

The FCE indicated Claimant had five degrees of lumbar flexion, but zero degrees of lumbar extension. (EX-15, p. 7). It further indicated Claimant had a two-degree range of motion in both right and left sidebends. There was significant restriction in left and right rotation. Id. Claimant was unable to perform isometric push/pull, as well as floor to knuckle lifts of any weight. (EX-15, p. 8). The FCE indicated a 5-pound limit on knuckle to shoulder lifts and on a "100-foot carry with a pivot." Id. Shoulder to overhead lifts were "not recommended," but assigned a 5-pound limit nonetheless. Id.

Regarding non-material handling, the FCE indicated that Claimant should never engage in the following activities: static trunk bending, crouching, repetitive squatting, stooping, and kneeling. (EX-15, p. 9). Additionally, Claimant should rarely stand, or participate in an overhead reach, pivot twist, or push/pull motions. (EX-15, pp. 9-10). The FCE indicated that Claimant should "rarely to never" climb stairs, and Claimant could walk on a "rare to occasional" basis. (EX-15, p. 9). Finally, the FCE allowed for occasional to frequent sitting and an occasional forward reach. (EX-15, pp. 9-10). The FCE indicated Claimant functioned at "a less than sedentary physical demand level." (EX-15, p. 4).

Additional Vocational Evidence

In his Progress Report of February 12, 2004, through March 29, 2004, Mr. Kirksey identified two jobs that fit Claimant's FCE work restrictions. (EX-15, pp. 1-3). The first job was found through a Labor Market Survey Report dated February 6, 2004. It was a full-time Reservation Sales Representative for Cendant Car Rental Group in Wichita Falls, Texas. The job was described as "mostly sedentary with no lifting;" further, it allowed the employee to change positions and stand as desired, with occasional walking. (EX-15, p. 2). Additionally, the job did not require bending or stooping, twisting, pushing/pulling, kneeling, climbing stairs, squatting, crouching, or climbing ladders. Id. The salary was not given, but information from the TWC indicated that in 2002, the mean hourly wage for this type of employment was $10.08. Id.

An opening for a part-time night watch guard was found through a Labor Market Survey Report done on February 7, 2004. (EX-15, p. 3). The night watch guard's only duty would be to sit at a counter in the lobby of a building and she could change positions "as desired." Id. It did not require lifting, stooping, bending, twisting, kneeling, pushing/pulling, climbing stairs or ladders, and there would be no crouching, standing, or walking. Id. The salary was $5.75 per hour. Id.

The Contentions of the Parties

Claimant contends that she has been permanently and totally disabled since August 4, 2000, the stipulated date of maximum medical improvement (MMI). Claimant argues that Employer's delay in approving spinal fusion surgery hindered her ability to recover from the surgery and ultimately worsened her condition. Despite her treatment through a pain management program, Claimant contends that she is unable to work due to constant pain. Claimant argues that she is not employable because she cannot maintain the consistent level of performance necessary in a competitive job market.

Employer contends Claimant is entitled to Permanent Partial Disability since Employer demonstrated suitable alternative employment on October 15, 2000. Employer argues that suitable alternative employment was evidenced when Dr. Zigler, Dr. Kern, and Dr. Wharton approved eight jobs identified in a Labor Market Survey conducted in October 2000. Additionally, Employer contends that suitable alternative employment was further evidenced by two more recent Labor Market Surveys, which were

generated in January 2004 and February 2004. In addition, Employer claims entitlement to a credit for any overpayment of compensation and interest on all overpayments.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. Claimant's Prima Facie Case

Based on the stipulations of the parties, I find that Claimant suffered a compensable injury on March 25, 1997.

Thus, Claimant has established a **prima facie** case that she suffered an "injury" under the Act, having established that she suffered a harm or pain on March 25, 1997, and that her working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of her disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical

improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

Claimant testified that she was employed as a reorder clerk at the time of her injury, performing duties that included stocking, inventory replenishment, receiving, and returning merchandise to a warehouse. Performance of these duties often required physical labor, stooping and bending, and lifting heavy boxes that could weigh as much as 50 pounds. Following her injury, Claimant's treating doctors excused her from returning to work by signing a series of work releases beginning with authorization from Dr. Cavett on March 28, 1997, and continuing throughout the course of treatment and surgery by Dr. Zigler. On July 2, 1997, Dr. Woosley opined that Claimant was capable of returning to her former job for two weeks on half-days and, if tolerable, then returning to full duty.

On August 8, 1997, Dr. Reeves indicated that Claimant could return to work in conjunction with physical therapy sessions and subject to a 10-pound lifting limit without repetitive lifting. However, on August 5, 1997, Dr. Woosley opined that Claimant was unable to work because of ongoing pain. He also concluded she could not return to her regular duties and had not reached MMI.

Further, the Functional Capacity Evaluation (FCE) performed in May 2000 imposed a 5 to 15 pound lifting restriction, with further limitations on Claimant's ability to engage in activities such as stooping, trunk bending, overhead reach, and stair climbing. In April 2000, when Dr. Zigler released Claimant for full-time work, the work release was subject to the restrictions to be identified in the May FCE.

Consultative physician Dr. Kern agreed with Dr. Zigler that Claimant could return to modified work. Dr. Wharton opined that Claimant was suited for clerical positions requiring minimal lifting and frequent postural changes. Neither opined she could return to her former job. In light of these restrictions and the opinions of the treating doctors and Dr. Reeves, I find that Claimant could not perform the duties required of her pre-injury employment, which involved lifting 50-pound boxes and frequent stooping and bending.

Regarding her more recent capabilities, Claimant credibly testified that her daily pain levels fluctuate depending on her level of activity. She uses a three-day pain patch which generates some relief on the first day and allows her to engage in activities such as grocery shopping. However, Claimant spends the second and third days in bed due to the increased pain.

In addition to the credible testimony of Claimant, the FCE report of March 1, 2004, indicated that Claimant functions at a "less than sedentary physical demand level," and places a 5-pound limitation on lifting and suggests lower frequency for "non-material handling" activities. The limitations set forth by the more recent FCE report indicates that Claimant is not capable of performing the duties required of her former job.

Based on her testimony, the medical opinions of record, and the FCE reports, I find that Claimant cannot and could not return to her regular employment because of her inability to perform the duties required of a reorder clerk. Accordingly, I find Claimant established a **prima facie** case of total disability due to her compensable lower back injury of March 25, 1997.

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following her injury, that is, what types of jobs is she capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which she reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (5th Cir. 1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997).

Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane

Co., 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that she tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

March 25, 1997 through August 3, 2000

Claimant was temporarily totally disabled from March 25, 1997 to August 3, 2000 when she became permanently disabled having reached MMI and is entitled to total disability compensation benefits based on her average weekly wage of $321.12. Claimant established a **prima facie** case of total disability, shifting the burden to Employer to establish partial disability through suitable alternative employment.

August 4, 2000 through October 8, 2000

On April 4, 2000, Dr. Zigler released Claimant for full-time work; however, he listed a 5-10 pound lifting restriction and required frequent position changes. On August 4, 2000, Dr. Zigler opined that Claimant had reached MMI and could return to full-time work with continued physical therapy. Since Employer/Carrier did not establish suitable alternative employment during this period, Claimant is entitled to permanent total disability compensation benefits from August 4, 2000 through October 8, 2000, based on her average weekly wage of $321.12.

October 9, 2000 through August 23, 2001

On October 9, 2000, Mr. Kirksey generated a labor market survey that identified eight jobs within the restrictions set forth in the FCE done on May 25, 2000. The October 2000 labor market survey is Employer's initial attempt to identify suitable alternative employment for Claimant.

In October 2000, Mr. Kirksey performed a labor market survey based on the restrictions set forth by Dr. Zigler's August 4, 2000, Work Status form. These restrictions were the same as those set forth in the FCE of May 2000, but included the following additions: Dr. Zigler limited Claimant's pushing/pulling capabilities to a 50-pound wheeled cart and Claimant was restricted to carrying a maximum of 10 pounds, with "waist/pivots" set at a 15-pound maximum. Mr. Kirksey identified eight full-time jobs for which Claimant was qualified based on her education and work experience, and that complied with Claimant's work restrictions. The eight positions were subsequently approved by Dr. Zigler on November 10, 2000. The eight positions were clerical in nature and required mostly sitting with occasional standing, walking, stooping, or bending. Claimant would be able to change positions as needed. The descriptions for the positions with Helen Farabee Center, Clerk III and Secretary II, indicated lifting of approximately 10-pounds. However, the remaining six job descriptions indicated either no lifting, or lifting between one and five pounds.

According to a progress report covering the period of September 13, 2000 through October 18, 2000, Claimant was notified of the eight full-time job openings and confirmed receipt of the list of positions on October 17, 2000. At hearing, Claimant testified that she "went to two of those places" and was instructed to apply for all openings through the TWC. However, the TWC informed Claimant that all eight positions had been filled.

Despite being released for full-time employment by Dr. Zigler and his approval of the jobs identified by Mr. Kirksey, Claimant did not try to obtain similar employment through the TWC, nor did she regularly pursue job postings through the TWC.[14]

[14] According to the trial testimony of Mr. Kirksey, the TWC does not actively place applicants in job openings. Rather, an applicant signs up with the TWC and it is the applicant's responsibility to check the job postings. In addition, Mr. Kirksey testified that the Wichita Falls labor market has job

Claimant attributed her lack of follow-up to her pain and her continued physical therapy sessions; however, her testimony indicated she did not seek employment during periods when she was not in physical therapy. Nonetheless, the evidence submitted by Claimant includes physical therapy reports from September 2000 and October 2000.

Notwithstanding Claimant's self-professed limitations, which were arguably considered by Dr. Zigler, Claimant testified that she could not work due to constant pain; however, the evidence contains no medical records, prior to August 24, 2001, to support her contention that her pain was extreme enough to prevent her from seeking or obtaining employment. Although I find Claimant's testimony credible, I give greater weight to the opinions of Dr. Zigler and Dr. Patel, who apparently did not find reason to revoke Claimant's work release prior to August 2001. Thus, I find Employer established suitable alternative employment effective October 9, 2000, at an average weekly wage earning capacity of $310.40.[15] Accordingly, Employer/Carrier are liable to Claimant for permanent partial disability benefits in the amount of $7.15 per week ($321.12 - $310.40 = $10.72 x .6666 = $7.15) commencing October 9, 2000 through August 23, 2001.

I find Claimant was physically capable of doing the jobs identified by Employer/Carrier which Claimant was reasonably capable of securing, given her age, education, work experience, and physical restrictions. Claimant did not use her work release to obtain employment when she was not in therapy and did not regularly contact the TWC concerning job postings. Consequently, I find that Claimant did not diligently seek employment during this time period.

August 24, 2001 through present

Dr. Patel, who had been treating Claimant since her referral by Dr. Zigler, signed a Work Status form on August 24, 2001, which indicated Claimant was "not job ready." Continually thereafter, Dr. Patel maintained that Claimant was permanently totally disabled from work. In a progress report dated January 31, 2003, Dr. Zigler supported Dr. Patel's recommendations

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openings, similar to the eight he identified, available on a regular basis.

[15] Seven of the eight jobs identified by Mr. Kirksey provided hourly rates of $7.99, $7.62, $8.00, $7.68, $7.28 (2), $8.50, which averaged $7.76 per hour yielding a wage earning capacity of $310.40 ($7.76 x 40 = $310.40).

concerning Claimant and her treatment. Dr. Zigler agreed that Claimant was not a "candidate for continued work."

Dr. Kern and Dr. Wharton examined Claimant and opined that she was capable of returning to work in the positions identified by Mr. Kirksey's October 2000 labor market survey. Dr. Kern rendered his opinion in December 2001 and deferred to Dr. Zigler's recommendations as Claimant's orthopedic surgeon. Dr. Wharton rendered his opinion in August 2003, and he, too, noted the approval of the jobs by Dr. Zigler.

However, Dr. Zigler rendered his recommendations and approval in November 2000, more than one year prior to Dr. Kern's opinion and more than two years prior to Dr. Wharton's opinion. Further, Dr. Zigler testified at his deposition that Claimant experienced an initial improvement in her condition, which eventually plateaued and then began to decline. During his deposition, Dr. Zigler stated that the employment identified by Mr. Kirksey was within Claimant's limits during the months following the initial FCE, but in the next two years her condition deteriorated to the point where it was no longer a viable option. To identify Claimant's present capabilities, Dr. Zigler suggested that a new FCE would be needed.

Because Claimant has a history of regular treatment by Drs. Zigler and Patel, I afford greater weight to their opinions on Claimant's current capabilities. Accordingly, I find that the jobs presented in October 2000 are not sufficient evidence to establish the existence of suitable alternative employment after August 24, 2001.

Mr. Kirksey performed a second Labor Market Survey in January 2004, which identified six full-time openings in the Wichita Falls area that averaged $9.73 per hour. This report was never given to Claimant. Mr. Kirksey also performed a third labor market survey in February 2004, in which he identified two part-time job openings in the Wichita Falls area. Both labor market surveys in 2004 were conducted pursuant to the restrictions imposed by Dr. Zigler in 2000. Again referring to Dr. Zigler's deposition, Dr. Zigler indicated a decline in Claimant's condition since 2000 and he pointed out that a new FCE was necessary to fully assess Claimant's current capabilities and restrictions. Accordingly, I find that jobs presented in the January 2004 labor market survey and the February 2004 labor market survey do not constitute suitable alternative employment because the conclusions reached were not based on a current assessment of Claimant's status.

The FCE generated on March 1, 2004, established that Claimant's work capabilities had diminished since the prior FCE. The second evaluation classified Claimant's work level as "less than sedentary." The more recent March 2004 FCE report places a 5-pound limitation on lifting and suggests lower frequency for "non-material handling" activities. In accordance with the March 2004 FCE, Mr. Kirksey identified two job openings from the February 2004 labor market survey that fit the restrictions suggested by the FCE. The first position was a full-time reservation sales representative with Cendant Car Rental Group. The job was described as "mostly sedentary." The second position was for a part-time night watch guard and its duties required the employee to sit at a lobby counter. Both jobs conform to the restrictions set forth in the 2004 FCE because neither job required lifting, bending or stooping, twisting, pushing/pulling, kneeling, squatting, climbing stairs, crouching, or climbing ladders. The night watch guard opening did not require standing or walking, but allowed the employee to change positions as needed. The reservations sales representative opening allowed the employee to change positions as needed and occasional standing and walking.

Although Mr. Kirksey identified two job openings that meet Claimant's recently established job restrictions, the evidence does not indicate that Dr. Patel has released Claimant for any kind of employment and continues to maintain Claimant as permanently totally disabled. I give greater weight to Dr. Patel's assessment of Claimant's current capabilities and find that Employer has not demonstrated suitable alternative employment. Accordingly, Claimant is entitled to permanent total disability compensation benefits commencing August 24, 2001 to present and continuing based on an average weekly wage of $321.12.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

The parties having stipulated that Claimant suffered a compensable injury, Employer/Carrier are responsible to Claimant for all reasonable, necessary and appropriate medical expenses casually related to her March 25, 1997, work injury.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer was notified of Claimant's work injury on March 25, 1997, and filed their first notice of controversion on July 16, 1997. Employer/Carrier commenced temporary total disability compensation payments on March 28, 1997.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified

of her injury or compensation was due.[16] Thus, Employer was liable for Claimant's total disability compensation payment on April 8, 1997. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by April 22, 1997, to be timely and prevent the application of penalties. I find and conclude that since Employer/Carrier paid Claimant the requisite compensation benefits due, penalties do not attach since no unpaid benefits occurred prior to the filing of a proper notice.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein. Although Counsel for Claimant filed an application for fees at the hearing (CX-11), Counsel is hereby allowed

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[16] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

thirty (30) days from the date of service of this decision by the District Director to submit an updated application for attorney's fees.[17] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 25, 1997 to August 3, 2000, based on Claimant's average weekly wage of $321.12, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from August 4, 2000, to October 8, 2000, and from August 24, 2001 to present and continuing, based on Claimant's average weekly wage of $321.12, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from October 9, 2000 to August 23, 2001 based on two-thirds of the difference between Claimant's average weekly wage of $321.12 and her reduced weekly earning

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[17] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 23, 2003**, the date this matter was referred from the District Director.

capacity of $310.40 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, and October 1, 2001, for the applicable periods of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 25, 1997, work injury, pursuant to the provisions of Section 7 of the Act.

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 13th day of September, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge